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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN MORAN,
RHODE ISLAND DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

BRIAN K. BURBINE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT

The American Bar Association (hereinafter ABA) is a voluntary, national membership organization of the legal profession. Its over 300,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the ABA has taken an active

interest in the improvement of the administration of justice and in increasing the availability and quality of legal counseling to those who need it.

The ABA Standards for Criminal Justice (2d Ed. 1980) (hereinafter ABA Standards) are a comprehensive set of "guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislature, courts, and practitioners to operate and keep it viable—all targeted toward achieving a criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future." *Id.* at XX. The first edition of the Standards was described by the Chief Justice as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." [1]

The Standards reflect this Court's view—strongly endorsed by the ABA—that "the lawyer occupies a critical position in our legal system because of his unique ability to protect Fifth Amendment rights of a client undergoing custodial interrogation." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). More importantly, they give effect to the Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), which recognized for the first time that the Fifth Amendment privilege against self-incrimination applies to custodial interrogation. The *Miranda* Court, to give full effect to the exercise of the Fifth Amendment privilege, created a right to counsel before and during interrogation which could be "waived" in very limited circumstances.

The ABA Standards accordingly state that counsel must be provided to the accused as soon as possible after custody begins and they place an affirmative burden on

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[1] Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974).

law enforcement agencies to facilitate communication between lawyers and individuals held in custody. (ABA Standard 5-5.1):

> "Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. The authorities should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person in custody requests counsel or is without counsel."

Standard 5-7.1 also provides:

> "A person taken into custody or otherwise deprived of liberty should immediately be warned of the right to assistance from a lawyer. This warning should be followed at the earliest opportunity by the formal offer of counsel, preferably by a lawyer, but if that is not feasible, by a judge or magistrate. The offer should be made in words easily understood, and it should be stated expressly that one who is unable to pay for adequate representation is entitled to have it provided without cost. At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. There should be provided for this purpose access to a telephone, the telephone number of the defender or assigned-counsel program, and any other means necessary to establish communication with a lawyer."

Both *Miranda* and the ABA Standards recognize that representation by lawyers is critically important in the early stages of the criminal justice process. The validity of this premise has been challenged in this case. Essentially, the Court must decide whether the Constitution permits the police to frustrate a lawyer's attempts to counsel a suspect who is held in custody and who is unaware that the lawyer has been retained for him. The Court must also decide whether the individual can knowingly and voluntarily "waive" his *Miranda* right to counsel without knowing that he, in fact, has a lawyer.

The ABA is deeply concerned that, if the police may constitutionally prevent any communication between a lawyer and an individual held in isolation, an important right to legal representation will be lost. The lawyer's counseling role in the early stages after arrest could thus be retarded by the police who, armed with a routine *Miranda* waiver of the abstract right to a lawyer, will be free to treat the real lawyer as an uninvited intruder in the post-arrest interrogation process. A lawyer seeking to fulfill his responsibility to aid a client in this setting will be powerless to do anything.

Many cases decided across the country demonstrate that there is cause for concern as to such police tactics.[2]

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[2] In all but the last two of the following cases, the Court excluded the statement(s) obtained. *Elfadl v. Maryland*, 61 Md. App. 132, 485 A.2d 275, *cert. denied*, 303 Md. 42, 491 A.2d 1197, *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-24) (lawyer retained by defendant's wife refused permission to communicate with defendant or have him informed of counsel's presence); *Lodowski v. Maryland*, 302 Md. 691, 490 A.2d 1228 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-23) (police prevented communication between lawyer and defendant and did not tell defendant that lawyer was present); *Dunn v. State*, No. 248-84 (Tex. June 26, 1985), summarized, 37 Crim. L. Rep. (BNA) 2274 (July 17, 1985) (suspect not told that his wife had retained an attorney who was close at hand); *Lewis v. State*, 695 P.2d 528 (Okla. 1984) (lawyer hired by defendant's parents misdirected by sheriff throughout jail and courthouse while defendant, unaware that parents had retained attorney, was being interrogated in another part of the building); *Commonwealth v. Sherman*, 389 Mass. 287, 450 N.E.2d 566 (1983) (police failed to honor lawyer's request to be present during interrogation and failed to inform suspect of the request); *Weber v. State*, 457 A.2d 674 (Del. 1983) (defendant's father and attorney hired by the father refused access to defendant; police failed to inform defendant of lawyer's presence); *People v. Smith*, 93 Ill.2d 179, 442 N.E.2d 1325 (1982) (associate of defendant's retained lawyer denied access to client based on fabricated claim that defendant was undergoing drug withdrawal and would not be interrogated in the near future; individual never told of lawyer's attempt to see him although he was given card lawyer left for

Our system of criminal justice, however, is accusatorial, not inquisitorial. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). The police should not have the authority to reject unilaterally the credentials of a lawyer retained by a custodial suspect's family or friends. The isolated suspect is entitled to know that a lawyer has been retained and that the lawyer has requested to represent him during interrogation. Without this knowledge, the suspect cannot knowingly waive his Fifth Amendment rights to consult with counsel and have counsel present during interrogation.

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him); *State v. Matthews*, 408 So.2d 1274 (La. 1982) (attorney's request to speak with defendant refused and instruction to cease interrogation ignored); *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980) (lawyer retained by defendant's wife was told where defendant was being held but the police moved him before lawyer could offer counsel and defendant never told of lawyer's request to offer counsel); *State v. Jones*, 19 Wash. App. 850, 678 P.2d 71 (1978) (defendant not informed that counsel had been retained for him or that attorney had instructed client not to speak); *Commonwealth v. Hilliard*, 471 Pa. 318, 370 A.2d 322 (1977) (lawyer first misinformed that defendant was not in custody and later denied access to defendant until he confessed; defendant was not told of lawyer's presence until he confessed); *State v. Jackson*, 303 So.2d 734 (La. 1974) (lawyer retained by defendant's family, denied permission to see defendant who was not told of the lawyer's presence); *Commonwealth v. McKenna*, 355 Mass. 313, 244 N.E.2d 560 (1969) (lawyer retained by suspect's mother asked to see client; police misinformed lawyer of suspect's whereabouts and did not indicate that he was already being interrogated); *Blanks v. State*, —— Ga. ——, 330 S.E.2d 575 (1985) (police finished taking confession before advising defendant that a lawyer was present who wished to see him); *State v. Beck*, 687 S.W.2d 155 (Mo. 1985) (en banc) (lawyer obtained by defendant's mother at defendant's direction given before he was in custody; lawyer called the police and asked to be notified when defendant was arrested but at prosecutor's suggestion police did not so notify lawyer when defendant was arrested in Florida, nor did they advise defendant of lawyer's request).

ARGUMENT

AN INDIVIDUAL CANNOT KNOWINGLY OR VOLUNTARILY RELINQUISH THE CONSTITUTIONAL RIGHT TO COUNSEL BEFORE AND DURING INTERROGATION IF THE POLICE HAVE BEEN INFORMED AND FAIL TO ADVISE THE INDIVIDUAL THAT COUNSEL HAS IN FACT BEEN SECURED FOR HIM AND WOULD ACT AS HIS LAWYER IF THE POLICE INTERROGATED HIM.

In the ABA's view, the constitutional issue presented for the Court's decision is whether the Fifth and Fourteenth Amendments permit the police to interrogate an individual in the absence of counsel if they fail to disclose to him that he in fact has a lawyer who previously contacted the police and told them "she would act as [his] counsel in the event that the police intended to . . . question him." (Pet. App. 49).

In deciding the issue, the Court must look to those cases which describe the pertinent rights and the circumstances in which they can be validly waived. In 1964, the Court found a Sixth and Fourteenth Amendment violation in a case in which the police, *inter alia*, prevented counsel from seeing a client during interrogation. *Escobedo v. Illinois*, 378 U.S. 478 (1964). In 1966, the landmark case of *Miranda* held that the Fifth Amendment privilege against self-incrimination protected an individual held in police custody. The individual had both a right to refuse to be interrogated and a right to the assistance of counsel before and during custodial interrogation. To ensure that individuals could fully exercise these rights, the Court mandated that specific warnings of these rights be given to those in custody. While the Court did not foreclose the possibility that the individual could waive these rights, it insisted that such waiver be knowing and intelligent. 384 U.S. at 474-75.

The *Miranda* opinion shows that the Court wished to dispel the compulsion inherent in custodial surroundings

and to guarantee, as best possible, that individuals were not forced to give up their constitutional rights while in isolation. 384 U.S. at 458-59. It was not enough, however, simply to insure that the individual knew he had a right to remain silent and therefore did not have to be interrogated. The Court emphasized the desirability of a lawyer's presence before and during custodial interrogation to protect the free exercise of the privilege against self-incrimination (384 U.S. at 466):

> "The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." [3]

The Court saw the lawyer's presence at interrogation as a fulfillment of a professional responsibility which reflected the lawyer's "vital role in the administration of criminal justice under our Constitution. . . ." 384 U.S. at 480-81. *Miranda* stopped short, however, of requiring that a lawyer be present before any interrogation could take place. It provided that an individual could waive the rights to silence and counsel if the police fully advised him of these rights and, thereafter, he knowingly and voluntarily elected to waive them. It is

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[3] Later in the opinion the Court elaborated on the role of counsel (384 U.S. at 470):

> "The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial."

clear that the Court viewed such "waivers" with considerable caution (384 U.S. at 474-75):

> "[I]f authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v Illinois, 378 US 478, 490, note 14. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v Zerbst, 304 US 458 (1938), and we reassert these standards as applied to in-custody interrogation."

The Court also proscribed unfair tactics utilized to obtain waivers (384 U.S. at 476):

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."

Miranda perceived the lawyer's *presence* at interrogation, rather than a *waiver* of that presence, as the best way to effectuate the Fifth Amendment privilege against self-incrimination. The ABA Standards reflect this preference by requiring that counsel be provided as soon as possible after arrest and by requiring the police to facilitate, not frustrate, this process. (ABA Standard 5-5.1)

The actions of the police in this case frustrated the efforts of counsel to assist Burbine in making a knowing and intelligent decision regarding his Fifth Amendment rights. Though Burbine was given standard warnings of his *Miranda* rights and waived them on three separate occasions (Pet. App. 4-6), he was never made aware that a lawyer had called the police station, indicated she represented Burbine, and asked to be present if the police intended to interrogate him.[4] (Pet. App. 14-15). Because the police did not inform Burbine of the lawyer's efforts,[5] Burbine did not make a knowing and intelligent waiver of his Fifth Amendment right to assistance from that counsel during interrogation.

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[4] Two police departments were investigating Burbine but were working closely together. (Pet. App. 17-18). For this reason, their collective knowledge of the lawyer's phone call should be presumed. *United States v. Scalf*, 708 F.2d 1540, 1544-45 (10th Cir. 1983) (collecting authorities); *Burbine v. Moran* (Pet. App. 16).

[5] The Court of Appeals concluded that the police frustrated Burbine's rights deliberately or recklessly. (Pet. App. 16-20). The Rhode Island Supreme Court concluded that the police conduct may well have been unintentional. (Pet. App. 64). This Court has noted in other contexts that constitutional decisions should not hinge on *post hoc* determinations of the subjective intentions of the police. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (officer's subjective intent to have suspect incriminate himself is not determinative of whether "interrogation" occurred); *New York v. Quarles*, 104 S.Ct. 2626, 2632 n.5 (1984) (collecting authorities). Once it is shown that the police were apprised that a lawyer was available to represent the accused, the burden must rest on the police to establish that their failure to so notify the accused was, as a practical matter, unavoidable. They did not do that here.

The information denied to Burbine must be considered material in evaluating the voluntariness of an uncounseled waiver of his rights to counsel and to silence. It will often be highly important to the arrested individual to know not only that he has a theoretical right to have some lawyer present at an indefinite time in the future but that a specific lawyer has already been retained for him by his family and is attempting to contact him. The arrested individual then has an opportunity to consider the identity of the attorney in making his decision.[6] The isolated suspect also then knows that the attorney is immediately available, without delay or inconvenience. If he is told that the attorney has requested that he not be questioned until the attorney can be present, the suspect becomes aware of the attorney's view with regard to an uncounseled waiver or an uncounseled interrogation. All of this information would be of substantial importance in deciding whether to waive the right to counsel or to silence. Particularly in light of *Miranda*'s narrow standard for demonstrating the voluntariness of uncounseled waivers, this information cannot be dismissed as irrelevant or immaterial.

The ABA's view is shared by the clear majority of courts that have addressed the issue. In *State v. Haynes*, 288 Or. 59, 602 P.2d 272, 278-79 (1979) (en banc), the Oregon Supreme Court stated the proposition as follows:

> "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide

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[6] The commentary to Standard 5-7.1 (at 5-70) reflects the ABA's concern that abstract offers of counsel made by police are not necessarily effective:

> "If the offer of counsel is made by a police officer or prosecutor, it is less likely to be stated fairly and to be intelligently understood, due to the adversary relationship between the parties."

Explicit advice that a lawyer has been retained by the suspect's family and wishes to see him could ameliorate this concern.

> at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's family, that fact may inspire additional confidence. . . . [W]hen law enforcement officers have failed to admit counsel to a person in custody or to inform the person of the attorney's efforts to reach him, they cannot thereafter rely on defendant's "waiver" for the use of his subsequent uncounseled statements or resulting evidence against him."

This view of *Miranda* has been adopted in Maryland,[7] Delaware,[8] Massachusetts,[9] Pennsylvania,[10] Louisiana,[11] Oklahoma,[12] Illinois,[13] and Washington.[14] All of these jurisdictions, except Louisiana, relied solely or in part on the federal Constitution and this Court's decisions. Only the Rhode Island courts herein, along with Georgia,[15] and

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[7] *Lodowski v. State*, 302 Md. 691, 490 A.2d 1228, 1243 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-23).

[8] *Weber v. State*, 457 A.2d 674, 685-86 (Del. 1983).

[9] *Commonwealth v. McKenna*, 355 Mass. 310, 244 N.E.2d 560, 566 (1979).

[10] *Commonwealth v. Hilliard*, 471 Pa. 318, 370 A.2d 322, 329 (1977) (plurality opinion).

[11] *State v. Jackson*, 303 So.2d 734, 737 (La. 1974) (police must honor a lawyer's request to speak to client as well); *State v. Matthews*, 408 So.2d 1274, 1278 (La. 1982).

[12] *Lewis v. State*, 695 P.2d 528, 530-31 (Okla. 1984).

[13] *People v. Smith*, 93 Ill.2d 179, 442 N.E.2d 1325, 1328-29 (1982).

[14] *State v. Jones*, 19 Wash. App. 850, 579 P.2d 71, 73 (1978).

[15] *Blanks v. State*, —— Ga. ——, 330 S.E.2d 575, 579 (1985). In this case the individual asked his mother to secure counsel for him when he was arrested.

arguably Missouri,[16] and Iowa,[17] would find routine *Miranda* waivers adequate in this type of case.

The ABA believes several other factors support adoption of the majority view. It is important to remember that "waiver" in this type of case is more than relinquishment of a right to counsel. The "waiver" is also a repudiation of the lawyer's directions to the police. Obviously Burbine was not knowingly countermanding the lawyer's instructions, of which he was unaware. Judge Lumbard, concurring in *United States v. Foley*, 735 F.2d 45, 50 n.1 (2d Cir. 1984), *cert. denied sub nom. Edler v. United States*, 105 S.Ct. 915 (1985), explains this proposition in terms of the authority of the lawyer to act for the individual:

> "[T]he interrogation of Edler in contravention of counsel's specific request did violate the right to counsel created by the Court in *Miranda*, "not to vindicate the constitutional right to counsel as such, but * * * 'to guarantee full effectuation of the Fifth Amendment privilege against self-incrimination * * *' *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966)." *Kirby v. Illinois*, 406 U.S. 682, 689. This conclusion presumes that counsel as an agent of the defendant may assert defendant's *Miranda* rights to have counsel present, *at least until that assertion is knowingly and directly repudiated by defendant.* However, I think that presumption is implicit in cases holding that pre-arraignment interrogation of a defendant without counsel present, despite counsel's specific request to be present, is a violation of defendant's Fifth Amendment rights, even when defendant has

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[16] *State v. Beck*, 687 S.W.2d 155, 157-58 (Mo. 1985) (en banc) (court noted that defendant asked his mother to secure counsel for him shortly before he was taken into custody).

[17] *State v. Blanford*, 306 N.W.2d 93 (Iowa 1981) (police were unaware that lawyer had called at request of defendant's brother and that lawyer represented defendant in a pending dissolution action).

himself knowingly waived his right to counsel . . . ." (citations omitted) (emphasis added)

Until the defendant has been informed of counsel's instruction, he cannot knowingly repudiate it.

The *Miranda* Court, relying on *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *People v. Donovan*, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963) (Fuld J.), considered any interference with retained counsel's attempt to offer counsel a per se violation of the Sixth Amendment. 384 U.S. 465, n.35. The *Miranda* reference to *Donovan* is instructive because in that case, as here, a lawyer retained by the suspect's family was denied access to the suspect. Judge Fuld, writing for the court, stated (193 N.E.2d at 630) (quoting *People v. Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445 (1961)):

> "[S]o here we condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together . . . . [I]f such a request is refused and a confession thereafter obtained, its subsequent use not only denies the accused the effective assistance of counsel but also . . . '*contravenes the basic dictates of fairness in conduct of criminal causes and the fundamental rights of persons charged with crime.*'" (citations omitted) (emphasis added).

We recognize that later decisions generally have restricted the Sixth Amendment right to assistance of counsel to events occurring after the commencement of judicial proceedings. *United States v. Gouveia*, 104 S.Ct. 2292, 2298 and n.5 (1984). Nevertheless, it is clear that the *Miranda* Court viewed police interference with communications between the suspect and counsel as unconstitutional. While subsequent decisions have clarified that it is the Fifth Amendment, rather than the Sixth, that limits police conduct at this stage of the criminal process, police interference with the attorney-client relationship

remains unfair and should be proscribed under Fifth Amendment "waiver" analysis.

For these several reasons, the ABA urges the Court to hold that a suspect cannot validly waive his Fifth Amendment rights where the police have failed to disclose that a specific lawyer, retained by persons familiar to the suspect,[18] has offered to provide representation. The rule sought by the ABA would be easy to administer, ethical and fair. The most often cited complaint about allowing counsel retained by a third party to intercede on behalf of a client who is under arrest is that such a rule places too much importance on the fortuity of finding an available lawyer. See Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When does it Matter?* 67 Geo. L.J. 1, 95 (1978). This fortuity is inherent in a system which permits—indeed, encourages—individuals to retain their own counsel.

It is no doubt true that requiring the police to advise a suspect of the lawyer's availability carries with it an ele-

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[18] The government seeks to characterize the lawyer, summoned not by Burbine but by his sister, as a volunteer lawyer with no legitimate power to represent him. The majority of cases that address this issue, most of which are summarized earlier in this brief at note 2, implicitly recognize the authority of a lawyer requested by a family member to act on behalf of a person held in custody. *See Lodowski v. State*, 302 Md. 691, 490 A.2d 1228 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-23); *Elfadl v. State*, 61 Md. App. 132, 485 A.2d 275 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-24); *Weber v. State*, 457 A.2d 674 (Del. 1983); *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980); *State v. Jones*, 19 Wash. App. 850, 579 P.2d 71 (1978); *Commonwealth v. Hilliard*, 471 Pa. 318, 370 A.2d 322 (1977); *State v. Jackson*, 303 So.2d 734 (La. 1974); *Davis v. State*, 287 So.2d 399 (Fla. App. 1974); *Commonwealth v. McKenna*, 355 Mass. 310, 244 N.E.2d 560 (1979); *People v. Donovan*, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963). *But see Blanks v. State*, —— Ga. ——, 330 S.E.2d 575 (1985); *State v. Beck*, 687 S.W.2d 155 (Mo. 1985) (en banc).

ment of fortuity. Whether family or friends are aware of the arrest; whether they know a lawyer already; whether the arrest occurs at a time a lawyer is available, are all factors which may determine whether representation can be secured before custodial interrogation takes place. The fortuity does not suggest any invidious discrimination against rich or poor. The lawyer will as likely be a public defender aiding an indigent family as a private lawyer interceding on behalf of a neighbor or affluent client.

Moreover, a constitutional right is no less a right simply because not everyone will benefit from it to equal degree. Thus, though the Sixth Amendment right to appointment of counsel does not attach for all misdemeanor trials, *Scott v. Illinois*, 440 U.S. 367 (1979), this Court has never suggested that the resulting inequality should be remedied by denying the right to counsel to everyone.

The dire forecast that volunteer or interloping attorneys may disrupt police operations by seeking to represent "anyone" in custody is not well-founded. A lawyer retained by an individual's family is neither an interloper nor a volunteer. In the ABA's view, the volunteer attorney's offer is effectively conveyed by routine *Miranda* warnings and would require no special advisement to people in custody. Nor will the rule sought by the ABA encourage solicitation to obtain clients at the police station. Direct solicitation of clients would be as unethical in the jailhouse as it would be in a hospital under the ABA Model Rules of Professional Conduct 7.3 or the ABA Model Code of Professional Responsibility DR 2-103(A), DR 2-104(A).

In the final analysis, the rule the ABA seeks is a recognition that the lawyer plays a vital role at interrogation that cannot be frustrated by the police. This reaffirmation of *Miranda* is critical to the effectuation of the ABA Standards.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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